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Class Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IGNACIO PEREZ, on Behalf of Himself
and all Others Similarly Situated,

Case No. 4:16-cv-03396-YGR

Plaintiff,
v.

RASH CURTIS & ASSOCIATES,

Defendant.

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR THE COURT TO
APPROVE THE PROPOSED NOTICE
TO CLASS MEMBERS OF PENDENCY
OF PLAINTIFF'S MOTION FOR AN
AWARD OF ATTORNEY'S FEES,
COSTS AND EXPENSES, AND SERVICE
AWARD FOR THE CLASS
REPRESENTATIVE**

Date: November 12, 2019

Time: 2:00 p.m.

Courtroom: 1

Judge: Hon. Yvonne Gonzalez Rogers

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on November 12, 2019 at 2:00 p.m. or as soon
3 thereafter as counsel may be heard by the above-captioned Court, located at 1301 Clay Street,
4 Oakland, CA 94612, Courtroom 1, 4th Floor in the Courtroom of Judge Yvonne Gonzalez Rogers,
5 Plaintiff Ignacio Perez (“Plaintiff” or “Class Representative”), by and through his undersigned
6 counsel of record, will move and hereby does move, pursuant to Fed. R. Civ. P. 23(h)(1) and the
7 Court’s September 9, 2019 Final Judgment Order, ECF No. 370, for an order approving the
8 Proposed Notice to Class Members of Pendency of Plaintiff’s Motion for an Award of Attorney’s
9 Fees, Costs and Expenses, and Service Award for the Class Representative.

10 This motion is made on the grounds that Fed. R. Civ. P. 23(h)(1) requires that notice of
11 Plaintiff’s Motion for an Award of Attorney’s Fees, Costs and Expenses, and Service Award for
12 the Class Representative be directed to class members “in a reasonable manner.” *See* ECF No. 370
13 at 2 (“Notice of the motion shall be directed to Class Members pursuant to Fed. R. Civ. P.
14 23(h)(1).”).

15 This motion is based on: (1) this Notice of Motion and Motion, (2) the Memorandum of
16 Points and Authorities in support thereof, (3) the Declarations of Scott A. Bursor (“Bursor Decl.”)
17 and Victoria Fellner (“KCC Decl.”) filed herewith, (4) the papers and pleadings on file, and (5) the
18 arguments of counsel at the hearing on the Motion.

19 **CIVIL RULE 7-4(a)(3) STATEMENT OF ISSUE TO BE DECIDED**

20 Whether the Court should approve Plaintiff’s Proposed Notice to Class Members.

22 Dated: October 7, 2019

BURSOR & FISHER, P.A.

23 By: /s/ Scott A. Bursor

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Class Counsel

1 On September 23, 2019, Ignacio Perez (“Plaintiff” or “Class Representative”) filed his
 2 Motion for an Award of Attorney’s Fees, Costs and Expenses, and Service Award for the Class
 3 Representative. ECF No. 371. Pursuant to Fed. R. Civ. P. 23(h)(1) and the Court’s September 9,
 4 2019 Final Judgment Order, ECF No. 370, Plaintiff hereby submits a proposed notice plan to notify
 5 class members regarding his motion for fees, costs and expenses, and service award.

6 **I. THE PRIOR NOTICE TO CLASS MEMBERS**

7 On November 12, 2018, Plaintiff filed a motion seeking for the Court to approve a notice
 8 plan pursuant to Fed. R. Civ. P. 23(c)(2)(B) whereby Kurtzman Carson Consultants (“KCC”)
 9 would 1) send a copy of a Long Form notice to all class members for whom email addresses had
 10 been identified, 2) send a copy of a Post Card notice to all class members for whom email
 11 addresses are not available or whose emails came back undeliverable, but postal addresses are
 12 available, and 3) cause a copy of the class notice to be posted on a dedicated website
 13 (www.rashcurtislawsuit.com) with links to important case documents. Plaintiff’s Proposed Notice
 14 of Pendency of Class Action, ECF No. 249. On March 5, 2019, Plaintiff filed a Request that the
 15 Court Approve the Pending Notice Plan and Motion to Shorten Duration of Class Notice Period.
 16 ECF No. 293. Defendant filed an opposition on March 8, 2019. ECF No. 294. The Court
 17 approved Plaintiff’s proposed notice plan on April 4, 2019. Pretrial Order No. 2 re: *Daubert*
 18 Motions, Select Motions *in Limine*, and Proposed Jury Instructions & Questionnaire, ECF No. 315,
 19 at 2 n. 4.

20 In April 2019, KCC implemented the notice plan in full, sending out the Long Form notice
 21 to class members for whom email addresses were available, sending out the Post Card notice to
 22 class members without email addresses and for whom postal addresses were available, and by
 23 establishing a notice website containing the contents of the Long Form notice and important case
 24 documents. KCC Decl. ¶¶ 2-4. No class members opted out. *Id.* ¶ 4.

25 The Long Form notice instructed class members that Class Counsel may ask the Court for
 26 an award of fees to be awarded out of any money obtained for the Class and that Class Counsel
 27 would ask for expenses to be paid by Defendant:

1 **15. How will the lawyers be paid?**

2 If Class Counsel get money or benefits for the Class, they may ask the
 3 Court for fees and expenses. You will not have to pay these fees and
 4 expenses. If the Court grants Class Counsel's request, the fees and
 5 expenses would be either deducted from any money obtained for the Class
 6 or paid separately by Defendant.

7 *See ECF No. 249, Ex. A (Long Form Notice), at 5, ¶ 15.* No class members objected to Class
 8 Counsel's ability to seek attorney's fees out of "money obtained for the Class," and no class
 9 members opted out of the class.

10 The prior notice also included and referenced the website, rashcurtislawsuit.com, where
 11 class members could find more information about the case, and would have available important
 12 documents from the case, such as the complaint, the answer, and the Court's orders on class
 13 certification and summary judgment. This website has been maintained continuously since notice
 14 was disseminated in April 2019.

15 **II. CLASS MEMBERS SHOULD BE NOTIFIED THROUGH THE SAME
 16 WEBSITE USED FOR THE INITIAL NOTICE**

17 Unlike Fed. R. Civ. P. 23(c)(2)(B), which requires "the best notice that is practicable under
 18 the circumstances, including individual notice to all members who can be identified through
 19 reasonable effort," Fed. R. Civ. P. 23(h)(1), which regulates the award of attorney's fees and costs
 20 in class actions, requires only that notice be "directed to class members in a reasonable manner."
 21 Here, as discussed above, Plaintiff has already caused direct notice to be provided to class
 22 members pursuant to Fed. R. Civ. P. 23(c)(2)(B). Both the Long Form and Post Card notices
 23 directed class members to visit the dedicated website – www.rashcurtislawsuit.com – for case
 24 updates and for more information. *See ECF No. 249, Exs. A, B.* The Long Form notice and the
 25 dedicated case website notified class members that Class Counsel would seek attorney's fees out of
 26 the class members' recovery at trial. *See ECF No. 249, Ex. A (Long Form Notice), at 5, ¶ 15.*

27 Since class members have already been directed to the case website, it is reasonable to
 28 apprise class members of Plaintiff's fee motion through 1) updating the case website with
 29 information about the result of the trial, 2) posting Plaintiff's fee motion and updated case-relevant
 30 documents on the website, and 3) giving class members 60 days to file objections, if any. A copy

1 of the updated content for the website is attached as Exhibit 1 to the Burson Declaration, filed
2 herewith.

3 On September 24, 2019, one day after Class Counsel filed the motion for attorney's fees,
4 costs and expenses, and service award, Class Counsel directed KCC to immediately upload the
5 following documents to the "Case Documents" page on the website:

- 6 • Plaintiff's Motion for an Award of Attorney's Fees, Costs and
7 Expenses, and Service Award for the Class Representative, ECF
No. 371;
- 8 • Declaration of Scott A. Burson in Support of Plaintiff's Motion for
9 an Award of Attorney's Fees, Costs and Expenses, and Service
Award for the Class Representative, ECF No. 371-1;
- 10 • Declaration of Ignacio Perez in Support of Plaintiff's Motion for
11 an Award of Attorney's Fees, Costs and Expenses, and Service
Award for the Class Representative, ECF No. 371-2;
- 12 • Final Judgment, ECF No. 370;
- 13 • Class Action Verdict Form, ECF No. 347.

14 KCC uploaded the documents that same day. KCC Decl. ¶ 6.

15 III. PROPOSED SCHEDULE

16 Plaintiff's Motion for an Award of Attorney's Fees, Costs and Expenses, and Service
17 Award for the Class Representative is set for hearing on January 14, 2020. ECF No. 371. Class
18 Counsel proposes that the deadline for any opposition to that motion should be 60 days after KCC
19 posts the updated content for the website, which is attached as Exhibit 1 to the Burson Declaration.
20 KCC will be able to effectuate such notice within seven days of an order from this Court approving
21 the proposed notice plan. As discussed above, KCC has already posted Plaintiff's fee motion, the
22 Burson and Perez declarations in support of the motion, the Final Judgment, and Class Action
23 Verdict Form on the website.

24 IV. IN THE ALTERNATIVE, PLAINTIFF PROPOSES DIRECT NOTICE WITH 25 DEFENDANT TO BEAR COSTS

26 The Ninth Circuit has recognized the "general principle that interim litigation costs,
27 including class notice costs, may be shifted to defendant after plaintiff's showing of some success
28 on the merits, whether by preliminary injunction, partial summary judgment, or other procedure."

1 *Hunt v. Imperial Merch. Servs., Inc.*, 560 F.3d 1137, 1143 (9th Cir. 2009). *See also id.* (noting that
 2 “many district courts have placed notice costs on the class action defendant once the defendant’s
 3 liability has been established”); *Sullivan v. Kelly Servs., Inc.*, 2011 WL 31534, at *1 (N.D. Cal. Jan.
 4 5, 2011) (“Defendant shall bear the costs of notice”). Thus, in *Hunt*, the Ninth Circuit held that it
 5 was appropriate “to require a class action defendant to pay the costs of class notification when the
 6 court has already determined that the defendant is liable on the merits.” *Id.*, 560 F.3d at 1139.
 7 Further, shifting costs of class notice is appropriate “in the attorney fee context,” and even though
 8 the relevant “time period for an appeal on liability has [not] expired.” *See id.* Here, Plaintiff and
 9 the Class have prevailed on their claims after a jury trial on the merits. Thus, should the Court
 10 determine that direct notice is required, the Court should order Defendant to pay the costs of any
 11 notice ordered by the Court within 14 days of the Court’s order. KCC, the previously appointed
 12 notice administrator, estimates that the cost of repeating another direct notice will be approximately
 13 \$19,022. KCC Decl. ¶ 5.

14 If the Court determines that another direct notice is required, Plaintiff proposes the same
 15 method of disseminating the notice as the method previously approved by the Court on April 4,
 16 2019. *See* ECF No. 315, at 2 n. 4. As before, Plaintiff proposes that KCC send an Email Notice to
 17 all class members for who email addresses had been identified, 2) send a copy of a Post Card
 18 Notice to all class members for whom email addresses are not available or whose emails come
 19 back undeliverable, but postal addresses are available, and 3) cause a copy of the Long Form
 20 Notice to be posted on a dedicated website (www.rashcurtislawsuit.com) with links to important
 21 case documents.¹ Copies of the proposed Email Notice and Post Card Notice are attached as
 22 Exhibits 2 and 3 to the Declaration of Scott A. Burson. The Email and Post Card notices update
 23 class members as to the trial victory and judgment. Burson Decl. Exs. 2, 3. They also inform class

24 ¹ As discussed above, on September 24, 2019, KCC already posted a copy of (1) Plaintiff’s Motion
 25 for an Award of Attorney’s Fees, Costs and Expenses, and Service Award for the Class
 26 Representative, ECF No. 371, (2) the Declaration of Scott A. Burson in Support of Plaintiff’s
 27 Motion for an Award of Attorney’s Fees, Costs and Expenses, and Service Award for the Class
 28 Representative, ECF No. 371-1, (3) the Declaration of Ignacio Perez in Support of Plaintiff’s
 Motion for an Award of Attorney’s Fees, Costs and Expenses, and Service Award for the Class
 Representative, ECF No. 371-2, (4) the Final Judgment, ECF No. 370, and (5) Class Action
 Verdict Form, ECF No. 347.

members that Class Counsel is seeking attorney's fees, costs and expenses to be drawn from the judgment, and that Plaintiff Perez is seeking a service award to be drawn from the judgment (and the respective amounts of each). *See id.* The notices also inform class members that they have the right to object to Class Counsel's requests for fees and expenses and Plaintiff Perez's service award, and direct class members how to make timely and proper objections. *See id.*

V. SCHEDULING

Should the Court rule that direct notice is required, Plaintiff proposes that the deadline for class members to object to Plaintiff's Motion for an Award of Attorney's Fees, Costs and Expenses, and Service Award for the Class Representative shall be 60 days after the dissemination of notice. Plaintiff and KCC will be able to effectuate direct notice within 14 days of an order from this Court approving the proposed notice plan.

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an order as soon as practicable directing notice to the class in accordance with the notice plans described herein.

Dated: October 7, 2019

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By: /s/ Scott A. Burson

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